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Materials on Contracts

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Table of Contents

Chapter 2. The Kinds of Promises that the Law Will Enforce

1. Introduction 233

Fuller & Eisenberg, The Role of Contract in the Ordering Processes of Society Generally 236
Problems 250
Fuller, Consideration and Form 251

2. Formal Validity of Contracts

Note 277
Dawson & Harvey, S.3, The Seal 279
Chilliback v. Pawliuk 282

3. Consideration

(a) The Bargain Theory. Consideration as Exchange

Note 286
Restatement II, §75 287
White v. Bluett 288
Thomas v. Thomas 289
Hamer v. Sidway 291
Questions and Problems 292
Note 293
Gilmore, The Death of Contract 295
Batsakis v. Demotsis 304
Post v. Jones 305
Barton v. Armstrong 307
Questions and Problems 314

(b) Mutual Promises

Note 315
G.N.R. v. Witham 317
Problems 319
Bernstein v. W.B. Mfg. Co. 320
Fuller & Eisenberg, pp. 191-195 321
Wood v. Lucy, Lady Duff-Gordon 326
Question 327
U.C.C. §2.306(2) & Comment 328
Problems 328
Questions and Problems 329

Automobile Dealer Day in Court Act, §1222 330
Stewart Macaulay, The Standardized Contracts of United States Automobile Manufacturers 331

(c) Past Consideration

Note 348
Mills v. Wyman 349
Webb v. McGowin 353
Eastwood v. Kenyon 355
Note 359
Wennall v. Adney 360
Questions 365
Roscorla v. Thomas 366
Problems 367
Note on Infants' Contracts and the Effect of the Statute of Limitations 368

(d) Performance of a Legal Duty as Consideration: Modification and Waiver of Contractual Duties

Harris v. Watson 369
Stilk v. Myrick 370
Raggow v. Scougall 372
Questions 372
Smith v. Dawson 373
Question 374
Gilbert Steel Ltd. v. University Construction 375
Questions and Problems 379
Note 379
Foakes v. Beer 383
The Mercantile Law Amendment Act, s. 16 387
Rommeril v. Gardener 388
Champlain Ready-Mixed Cement v. Beaupré 390
Fairgrief v. Ellis 392
Note 394
Scotson v. Pegg 395
Shadwell v. Shadwell 396
Questions 398
De Cicco v. Schweitzer 399
Questions and Problems 403

(e) Third Parties and Consideration

Note 404
Tweddle v. Atkinson 404
Questions 405
Beswick v. Beswick 407

Beswick v. Beswick 419
Questions 426
Jackson v, Horizon Holidays 427
Questions 432

(f) Reliance as a Basis for the Enforcement of Promises

Note 433
Central London Property Trust Ltd. v. High Trees House Ltd. 434
Imperator Realty v. Tull 438
Question 442
Combe v. Combe 443
Questions and Problems 446
Restatement of Contracts, §90 447
D. & C. Builders v. Rees 448
Questions and Problems 452
Watson v. Canada Permanent Trust Co. 453
Questions 459
Skidmore v. Bradford 460
Questions 462
Baxter v. Jones 463
Problems 466
Sloan v. Union Oil Co. of Canada 467
Dalhousie College v. Boutilier Estate 471
Questions 480
Re Ross 481
Note 484
Balfour v. Balfour 485
Questions 491
Jones v. Padavatton 492
Questions 497
Simpkins v. Pays 498
Questions 500
Llewellyn: What Price Contract? An Essay In Perspective 501

Table of Contents

Chapter 3. Making The Contract

1. Introduction

Note 505
Raffles v. Wichelhaus 507
Questions 508
Henkel v. Pape 509
Problems and Questions 510
Hobbs v. Esquimalt and Nanaimo Railway Co. 511
Questions and Problems 515
Restatement II, §21A 516

2. The Classical Theory of Offer and Acceptance

(a) What is an Offer?

Johnston Bros. v. Rogers Bros. 517
Questions 519
Denton v. G.N.R. 520
Lefkowitz v. Great Minneapolis Surplus Store 522
Note 524
Pharmaceutical Society v. Boots 525
Combines Investigation Act, c. C-23, s. 37 528

(b) When do Negotiations Come to an End? The Problem of Indefiniteness

Problems 530
May v. Butcher Ltd. v. The King 532
W.N. Hillas & Co. Ltd. v. Arcos Ltd. 536
Jewson v. Arcos 545
Foley v. Classique Coaches, Ltd. 549
Questions 554
Brown v. Gould 555
Note and Question 560
Knapp, Enforcing the Contract to Bargain 561
Courteney v. Tolaini 562
Labour Relations Act, c. 232 564
Question 564
Brewer Street Investments v. Barclays Woolen Co. 565
Questions and Problems 567

(c) The Power of Acceptance

Note 568

Questions 569
Dickinson v. Dodds 570
Questions and Problems 575
Restatement II, §35 575
Bristol, Cardiff and Swansea Aerated Bread Co.
v. Maggs 577
Bellamy v. Debenham 580
Problem 580
Harvey v. Perry 581
Note 585
Adams v. Lindsell 586
Note 587
Household Insurance v. Grant 588
Problems 598
Post Office Act, c. P. 14 598
Tinn v. Hoffmann 599
Eliason v. Henshaw 605
Note 607
Wheeler v. Klaholt 608
The Consumer Protection Act, c. 82 609

3. The Battle of the Forms

Note 610
Matter of Doughboy Industries Inc. 611
Roto-Lith, Ltd. v. F.P. Bartlett & Co. 617
Uniform Commercial Code, §2-207 620
Note 622
Fuller, Law's Precarious Hold on Life 624

4. Offers Calling for an Act not a Promise

Note 638
Carlill v. Carbolic Smoke Ball Co. 639
Williams v. Carwardine 649
Fitch v. Snedaker 650
The Crown v. Clarke 652
Extract from Globe and Mail 658
Problems 658
Petterson v. Pattberg 659
Errington v. Errington 662
Questions 664
Dawson v. Helicopter Exploration Co. Ltd. 665
Dennis Reed Ltd. v. Goody 672
Extract from K.N. Llewellyn 675

Chapter 2. The Kinds of Promises That The Law Will Enforce

1. Introduction

The kinds of contracts that we examined in Chapter 1 covered a very wide range of situations. At one end there were contracts between businessmen--what we can regard as normal commercial contracts. At the other end we had the contract that was enforced in Re Spears (supra, p. 219). In the middle we might put the contract made between Mr. Tyler and the Wroths (Wroth v. Tyler, supra, p. 105). We saw that the attitude of the courts to any particular contract might vary depending on the kind of transaction represented by the contract, though, as we also saw, the courts sometimes forced every contract into the same mould and assumed that there could be a unified approach. As examples of these kinds of approaches, one only has to consider Jarvis v. Swan's Tours, (supra, p. 163), where the fact that this was a contract to provide a holiday was crucial to the remedy given to the plaintiff; and Sullivan v. O'Connor (supra, p. 54) where the competing approaches are discussed.

In all these cases the courts assumed that there was a contract and that it would be enforced. As we saw, the consequences of enforcement were often serious and, clearly, the courts saw their job as important. The reasons for enforcement of promises can vary depending on the kind of promise that is involved. The promise made in a commercial context is enforced because it is believed that without such enforcement business relations would be something quite different from what they are and what we believe they should be. This promise is enforced because the agreement that is the contract represents an exchange transaction that is the basis of most commercial activity. The reasons for the enforcement of contracts like that in Wroth v. Tyler are much the same. It may be true that Mr. Tyler (and certainly Mrs. Tyler) are not in the business of selling (or buying) houses, but the kind of contract that they made with the Wroths is a contract very similar to that made by a commercial enterprise. Certainly, from the point of view of the Wroths the contract was as important as any made by a business. The court clearly regarded the contract in this way. We can summarize these points by suggesting that the commercial contract (and those that are similar) present claims for enforcement for the following reasons:

1. Much of modern business activity is dependant on contracts and on their enforcement.

2. Since enforcement of such contracts is the rule, people of all kinds come to rely on contracts in planning their affairs, and in any single case, the existence of such reliance may be a reason for the enforcement of that contract. (Of course, the enforcement of any individual contract increases the feeling that contracts in general will be enforced and so we go round again).

3. No one is going to be surprised (and certainly not unfairly surprised) by the enforcement of such contracts.

4. The expectations of both parties to the contract are probably fairly obvious and the courts are usually able to enforce them with a clear idea of what was the basis for the contract and what will happen if the contract is enforced or enforced in a particular way. (When this kind of background knowledge is forgotten or ignored we have problems like those in Cotter v. General Petroleums, supra, p. 37. On the other hand if the courts have a particular view of only the commercial aspects of a contract, we get the kinds of problems that came up in Peevyhouse v. Garland Coal, supra, p. 1)

These points are obviously closely interrelated and, as has been mentioned, there are reinforcing effects. The same reasons for enforcement are, however, not applicable in all cases. For example, the reason for the enforcement of the "contract" in Re Spears was not that any of the parties had relied on there being, or even expected there to be a contract, but the court's desire to give effect to its sense of what was fitting in the distribution of a man's estate on his death. It was just lucky for the "widow" that she could establish a contractual basis for her claim. If there had been provision in Nova Scotia law for the "widow" to claim directly against the deceased's estate (similar to the right given in Ontario to a wife under the Devolution of Estates Act or the Dependants' Relief Act) then the contract problems would never have come up. As we shall see, the kind of problem that arose in Re Spears will come up again in this Chapter.

Since the pressures towards enforcement are obviously so different in each case, the determination of the question whether a particular promise will be enforced or not might be expected to focus on the issues that have just been discussed. To some extent this is so. You will see that it will be important to notice that the transaction is a commercial one or a gift-type one, or one where there was obviously reliance on a promise made by one party. It will also be of very great importance to notice the historical evolution of the law. The reasons that are regarded as justifying enforcement in one case and not in another depend almost as much on the social context of the promise that is in issue as on whether the promise is made in a commercial context or not. It has been said that the development of the law and legal ideas has been characterized by the expansion of the scope of the legally relevant. (See, for example, Fuller, American Legal Realism, (1934) 82 U. Pa. L.R. 429, 434). The range of promises and the circumstances of their making now accorded some legal effect is wider than was the case one hundred years ago. This kind of historical development cannot be ignored.

Unfortunately, as you may by now expect, the approach actually taken by the courts will cover a very wide range of issues. On one hand

the courts will be very concerned with the kind of promise that was made and the way in which it was made. But, on the other hand, these concerns will sometimes be subordinated to doctrinal purity, and the reason for a result will be found not in any analysis of the reasons why a particular promise will or will not be enforced, but in whether or not it satisfies certain formal and technical rules that have been laid down. This refers to the mysterious term "consideration", the meaning of which we shall explore at length.

The focus of this chapter will, therefore, be on one of the issues which we bypassed in the first chapter. As the title to this chapter indicates, we will be concerned to know how the law answers the question, "What promises are going to be enforced as contracts and what ones are we going to leave unaffected by any legal remedies?"

The first extract is a brief introduction to the modern role of contracts in the context of other forms of social ordering. It is important to keep in mind the range of ways in which society can be ordered so that the scope and importance of the role of contracts is clearly seen. The second extract deals with the more technical aspects of the answer to the question which is the concern of this chapter. Thereafter we shall be exploring the cases and what the courts are actually doing.